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Supreme Court of the United States

OCTOBER TERM 1948

No. 647

A. B. MOMAND,

VERSUS

UNIVERSAL FILM EXCHANGES, INC.
LOEW'S, INC.
METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION
TWENTIETH-CENTURY FOX FILM CORPORATION
VITAGRAPH, INC.
RKO DISTRIBUTING CORPORATION
UNITED ARTISTS CORPORATION
COLUMBIA PICTURES CORPORATION.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION.

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MARCH, 1949.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of A. B. Momand respectfully shows as follows:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

On June 7, 1937, the plaintiff brought an action under the anti-trust laws in the United States District Court for the District of Massachusetts, as the assignee of ten corporations engaged in the operation or management of motion picture theatres or in the ownership of the fees of such theatres in Oklahoma, against the defendant distributors of motion picture films. The declaration in ten counts alleged a conspiracy to restrain and to monopolize interstate commerce in said films by means of various practices and subsidiary conspiracies therein specified (R. 16).

There were three separate trials: (1) upon the defense of the statute of limitations (43 F. Supp. 996); (2) upon the defenses of estoppel by judgment and *res judicata;* and (3) upon the merits before a jury.

After a lengthy trial, with directed verdicts for Loew's and Vitagraph, the plaintiff secured verdicts on all counts against all other defendants for actual damages aggregating $287,161, with interest for specified periods at the rate of five per cent. per annum (R. 124-5). Upon motions of the defendants (R. 174-86), the trial judge directed verdicts for all defendants, and, after filing an opinion (R. 187-246; 72 F. Supp. 469), entered judgment for them (R. 186-7). The Court of Appeals affirmed the judgment (R. 2016-35).

1. Statute of Limitations.

At the separate trial in 1942 upon a statement of agreed facts (R. 82-91) it appeared that the plaintiff, a citizen of the State of Oklahoma, had brought an action on April 17, 1931, in the United States District Court for the Western District of Oklahoma, No. 4512, against the defendants here and other persons and corporations (R. 83), which, after several challenges to the complaint, was dismissed without prejudice in 1937, after a mandate from the Circuit Court of Appeals (R. 83, Ex. D). *Momand* v. *Paramount Publix Corporation* (C.C.A. 10) 88 F. 2d 578; see opinion of District Court here, R. 104, Thereafter the plaintiff brought this action on a number of the causes of action embraced in the original suit, and two new actions in Oklahoma, No. 6516 against substantially the same defendants as here on different cause of action, and No. 6517 on all the causes of action against various other persons and corporations.

In his Findings of Fact and Conclusions of Law (R. 91-125; 43 F. Supp. 996) the District Judge, because of a "borrowing" provision of the Massachusetts statute (G.L. [Ter. Ed.] c. 260, ss. 2, 9), applied the six-year statute of Massachusetts, limiting recovery to causes of action accruing subsequent to June 7, 1931, and the three-year statute of Oklahoma, limiting recovery on causes of action alleged in the original complaint, Oklahoma No. 4520, to those accruing after April 17, 1928, and on an amended and supplemental petition filed August 27, 1934, to causes of action after August 27, 1931 (R. 119, 120, pars. 26, 27). The result was to bar all causes of action as to Loew's (R. 119, par. 25) and any action as to the other defend-

ants arising prior to specified dates in 1931, except so far as the running of the statute was suspended by two Government suits.

The District Judge ruled that even in the case of a continuing conspiracy, such as that charged in the declaration, the cause of action arose and the statute began to run when the injury was sustained (R. 109-11, pars. 3-6). He made no findings or rulings as to the time the plaintiff or his assigning corporations had knowledge of the defendants' conspiracy.

It also appeared that the United States had brought a number of equity suits and criminal proceedings against most of the defendants (R. 84-91; Ex. E-PP, annexed to statement of agreed facts). Among these were the suits to restrain the standard contract-arbitration and credit committee conspiracies condemned in —

Paramount Famous Lasky Corporation v. *United States* 282 U.S. 30;
United States v. *First National Pictures, Inc.*, 282 U.S. 44.

The trial judge ruled that by reason of the Clayton Act, 15 U.S.C.A. 16, these suits tolled the statute during their pendency (that is, for a period of three years, three months and one day) against all defendants except Columbia and Loew's only as to the portions of the causes of action based upon the standard contract and credit committee conspiracies, but not as to the general conspiracy alleged, of which each of these was only a part (R. 121-23, pars. 30-31).

Other suits and indictments were brought to restrain or to punish conspiracies in various cities and localities,

such as Los Angeles, Chicago, New Orleans and St. Louis, relating to the monopolizing of first-run films or preventing the use of double features, gifts or premiums, or establishing a structure of runs and clearance, or preventing independent exhibitors from securing first-run films, or prescribing minimum admission prices to be charged by subsequent run exhibitors (P. 86-7, Ex. S., ex. pp. 63-65; R. 87-88, Ex. V; R. 88, Ex's X, Y, Z, AA; R. 88-89, Ex. CC; R. 89, Ex's DD, EE, FF, GG; R. 89, Ex's HH, II and JJ.) (See *United States* v. *Interstate Circuit, Inc.*, [D.C. Tex.] Eq. No. 5736-992 [R. 89-90, Ex's KK, LL, NN, OO] opinion 20 F. Supp. 209; *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 209.)

The District Judge ruled that none of these proceedings tolled the statute (R. 123-24, pars. 32-33). Shortly thereafter he entered a "judgment" (R. 133-34).

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2. Estoppel by Judgment and Res Judicata.

In 1946 there was another separate trial, upon the defenses of *res judicata* and estoppel by judgment (R. 250-346) raised by a supplemental answer of the defendants (R. 136-39). It appeared that in 1944 judgments were entered in the District Court for the Western District of Oklahoma in the actions by the plaintiff already mentioned.

In No. 6516, entitled *Momand* v. *Twentieth-Century Fox Film Corporation, et al.* (Deft. Ex. 4, R. 253; Ct. Ex. 4, R. 388, 1389-1431), with minor exceptions, the defendants were the same as, but the assigning corporations and the causes of action were different from, the defendants and the assigning corporations and the causes of action in Massachu-

setts. In both actions claims were based upon assignments from Momand Realty Corporation, but the claim in Oklahoma related only to its real estate in the Town of Maud, Oklahoma, while the Massachusetts action related only to interests in Clinton and Wewoka. In both actions also claims were based upon assignments from Momand Theatres, Inc., but the claim in Oklahoma was founded upon management contracts with operating companies other than those that had made the assignments relied upon in the other causes of action here. The Oklahoma court entered judgment for all defendants (Deft. Ex. 1, R. 252; Ct. Ex. 1, R. 388, 1258-59).

In No. 6517, entitled *Momand* v. *Griffith Amusement Company et al.* (Deft. Ex. 5, R. 253; Ct. Ex. 5, R. 388, 1431-35) the action was based upon all the assignments, but the parties were different from the parties in the Massachusetts action and in Oklahoma No. 6516. The Oklahoma judge found for the plaintiff against Paramount Pictures, Inc. in one cause of action, not upon the general conspiracy alleged but for a conspiracy to monopolize the distribution and exhibition of films in Wewoka, and against Griffith Amusement Company in two other causes of action for monopolizing by the overbuying of product in Shawnee. In other respects he entered judgment for all defendants. The entry recited that the court sustained "the motions of all defendants to dismiss the amended complaint and the various counts thereof for damages alleged to be the result of the generic conspiracy * * *." (Deft. Ex. 2, R. 252; Ct. Ex. 2, R. 388, 1259-61).

In consolidated findings of fact and conclusions of law the Oklahoma court determined that there was a gen-

eric conspiracy only as to the standard contract and arbitration, the credit practices, minimum admission price and protection or clearance (Deft. Ex. 3, R. 252, Ct. Ex. 3, R. 388, pars. C-6, C-7, C-8, C-9, R. 1336-37). He also found that none of the assigning corporations was injured by the generic conspiracy or any part thereof (*Id.*, pars, C-14, 102e, 105, 109f, 110g, 114l, R. 1346, 1348, 1350, 1356, 1358, 1374).

In substance the trial judge ruled that the Oklahoma findings and conclusions on the issue of conspiracy were conclusive here (R. 305); but that, except as to Vitagraph, the findings as to causation and damage in No. 6517 were not binding upon the parties, and that Vitagraph, as a wholly-owned subsidiary of Warner, a defendant in Oklahoma No. 6517, had the benefit of the judgment in favor of Warner (R. 307, 308, 327-28, 339, 340-41).

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3. The Jury Trial.

The injury to the Momand companies consisted of the decrease of gross receipts, the loss of physical equipment and good-will of all except two theatres, and the loss of the fees of three theatres. Generally the plaintiff attributed the damage in each locality to two or more of the following causes: (1) booking practices, in pursuance of the standard contract-arbitration conspiracy; (2) refusal of the distributors to supply product, either because of the credit conspiracy, or, in some instances, to cooperate with competitors in the overbuying of product in order to injure the operating companies; (3) promotion of competition against the plaintiff's companies, chiefly by Paramount and its agents, and the oversupply of product to competi-

tors by the defendants; and (4) beginning in 1931, the depression. No claim was made against the defendants for losses due to the depression.

Early in the trial the District Judge introduced in evidence the judgments and pleadings and the findings and conclusions in the Oklahoma actions (Ct. Ex. 1-10, R. 387). After the plaintiff had introduced the petitions and final decrees of the New York court in the standard contract-arbitration and credit committee conspiracy cases (Pl. Ex. 1-4, R. 381-2, 390-1, 393, 396, 1547-89) the court strictly limited his evidence to proof of damage from those conspiracies during the period of time left open by the rulings on the statute of limitations (R. 455, 552, 622-27, 758). In substance he ruled that the Oklahoma findings were conclusive as to the general conspiracy (R. 400, 484, 490, 525-26, 591-92, 594-5, 1176) but not as to causation and damage (R. 400, 629-30, 758, 797, 1177, 1184).

Notwithstanding these rulings the plaintiff contended that the judgment in Oklahoma was not a final adjudication of issues raised by the proceedings here and not decided there; that the injuries were the foundation of the causes of action; and that he was not precluded from proving that his companies had been ruined by a specific conspiracy to destroy them, chiefly because of his opposition to the defendants' illegal practices (R. 286-7, 290, 356, 380, 402, 415). The trial judge repeatedly stated that the only issues related to the effect upon the assigning companies of the uniform contract and credit policies (see, for example, 758). Near the close of the trial, however, he ruled that if the plaintiff could show a conspiracy different from that

found in Oklahoma there would be no estoppel (R. 955-56). But when, in relation to Shawnee (counts 1 and 2), counsel had specified the portions of the declaration on which he relied and had given an outline of the proposed testimony, the court declined the offer of proof (R. 961-66; see opinion R. 191).

Even the evidence admitted warranted a finding that for many years the plaintiff had been a satisfactory customer of the defendants; that it had been the general practice of the distributors to license to independent exhibitors all their season's product before the films were produced, a practice known as "block booking" and "blind buying" (R. 540-1, 559-60), and to cancel unplayed product at the end of a season on a deal by which the distributor would get a partial settlement of revenue on unplayed pictures and a contract for additional films (R. 541-2); and that prior to the 1928-29 season it had been the custom to accept play-dates submitted by the Momand bookers, without insistence that pictures be played in the order of release (R. 533, 539-40), and to comply with requests for changes in booking (R. 757-8).

The standard exhibition contract, paragraph Eighth, stipulated that exhibition dates should be determined as specified therein, unless otherwise provided for in the schedule. It definitely specified the method and the time of booking and playing films, including the arbitrary designation of play-dates by the distributor. (Pl. Ex. 1, R. 385, 1522-24) The plaintiff's companies were required to book and play films in accordance with the provisions of that contract (R. 667-8, 951, 1092; see Pl. Ex. 189, R. 946-7). The license agreements of Metro and Fox, on the standard

form, usually contained an additional provision that the films licensed should be played in the order of release (see Pl. Ex. 115, R. 803, Metro cont. No. 5631, R. 1733; Pl. Ex. 119, R. 803, Fox cont. No. 5110, R. 1754-55). Until the season of 1930-31 the contracts of some other distributors did not contain any such provision (i.e., RKO, Pl. Ex. 73, R. 728-9, 1661; Universal, Pl. Ex. 163, R. 928, 1735-36), and the contracts of Paramount, Vitagraph and First National never stipulated that exhibition should be in the sequence of release.

In October, 1927, when the Alva company acquired its theatres and the plaintiff declined to assume the uncompleted contracts of the previous owners, Paramount and Metro refused to license their product to the operating company (R. 608-10) and Paramount promoted competition against it (R. 611, 938-40; Pl. Ex. 181, R. 937). Early in 1929, after the acquisition by the Clinton company of its theatres and the refusal by the plaintiff to assume uncompleted contracts, the distributors concertedly boycotted that company and refused to supply films until the plaintiff furnished a "credit" statement (R. 717-23, 734-40; Pl. Ex. 65, R. 724, 1638-40; Pl. Ex. 79, R. 734-36). Even thereafter some of the distributors continued the boycott (R. 742-45).

In the summer of 1929 the various distributors insisted that the Momand companies play their product in the order of release (R. 1024-26), and refused to allow them to play good pictures—that is, "deadline" films—until dates were given on all prior releases (R. 552-3, 1092-3). Insistence upon this practice prevented the Momand theatres from properly dating pictures, or securing

a "balanced" program (R. 417, 544); the old pictures accumulated, and it was necessary to play them several months late, after they had been exhibited in other cities (R. 532-3, 535, 617, 673).

Over a period of years the distributors made frequent and continuous threats to the plaintiff and his booker that if all unplayed pictures were not exhibited arbitration proceedings would be instituted (R. 627, 633, 678-9, 680, 682, 683-4, 758, 763, 808, 831, 841, 851, 852-3). As a consequence the Momand companies played product at inconvenient or undesirable times (R. 794, 808-9, 856, 858); that is, on dates that were detrimental to the theatres (R. 680-1).

If the plaintiff would not give a play date demanded, a distributor would "assign" or "designate" an arbitrary date, in accordance with the booking provisions of the standard contract (R. 852, 1092; see Pl. Ex. 189, 192, R. 946-7, 904-6). The dates were assigned for periods when films of other distributors were booked, and it was necessary to arrange with the other distributors to remove their dates in order to play the pictures shipped. Occasionally the operating company refused a picture shipped. (R. 851-2) Upon the refusal of a shipment an arbitration complaint might be filed by a distributor. Many complaints were filed against the Momand Companies (Pl. Ex. 52, R. 625, 1590-98; Pl. Ex. 85-87, R. 783, 1681-3; Pl. Ex. 94-96, 99-101, R. 788-89, 792, 1686-96; Pl. Ex. 111, R. 795, 1698-1728). Generally the purpose was not to obtain a money award for a single feature but to secure dates for all unplayed product in accordance with the standard contract (see R. 625-27).

The proceedings against the Momand companies before the arbitration board were under the direct supervision of "the head office of the Hays organization;" that is, the Motion Picture Producers and Distributors of America, Inc. (Pl. Ex. 111, R. 795, sheet 55, R. 1729-30).

The problem created by the arbitration complaints was solved by working out rebating arrangements or by making contracts for additional films, or by the cancellation or exhibition of films (R. 797-800). For example, a Vitagraph complaint (Pl. Ex. 94; R. 788) was adjusted by an agreement of the plaintiff to release "Jazz Singer," an outstanding feature then under contract, so that Griffith might play it in Shawnee in the "talking version" (R. 797). In 1928 an arrangement was made for the cancellation of some old pictures of Vitagraph that had been the subject of arbitration, in conjunction with the execution of contracts for new product (Pl. Ex. 152, R. 898, 901-2). In 1929, after negotiations in regard to pictures specified in the arbitration complaints of First National (Pl. Ex. 111, R. 795, 1716-1730), the plaintiff's companies made deals with that company for various situations for old product of no value for $6,565 and for new product in the amount of $13,090 (Pl. Ex. 150, R. 881-87).

Because the plaintiff was "a leader of exhibitors in this territory" Paramount's branch manager suggested to the home office that "we should step on him quickly" (Pl. Ex. 180, R. 934). Paramount promoted competition against the plaintiff's companies, not only in Alva but also, with the co-operation of other distributors, in substantially all the localities where they operated (R. 938-40, 753, 769, 838; Pl. Ex. 82, R. 772; Pl. Ex. 177, R. 930; Pl.

Ex. 178, R. 930; Pl. Ex. 179, R. 930-34). Various exhibits relating to the promotion of competition were excluded (Pl. Ex. 182 Iden., Pl. Ex. 183 Iden., Pl. Ex. 184 Iden., R. 943; Pl. Ex. 185 Iden., R. 944-46; Pl. Ex. 186 Iden., R. 946; Pl. Ex. 187 Iden., R. 946).

The plaintiff testified categorically that the damage to the Alva company was due to the adverse effect of the standard contract conspiracy and the defendants' credit practices (R. 650-1). The loss of gross receipts at Clinton during part of 1929 was due to the refusal of the distributors to supply product because of the plaintiff's refusal to furnish a credit statement or to assume uncompleted contracts (R. 687-8). In other specified situations in various years the damage was due solely to booking difficulties, or to arbitration and booking difficulties (R. 829, 834, 846-47). In other years in various localities the plaintiff attributed a specific proportion of the loss to that cause (R. 861-2, 864-65, 911-12, 926; see R. 984-6).

The court charged the jury that the plaintiff might recover any damage sustained by refusal of the distributors to license films to an assigning corporation because it had refused to assume the uncompleted contracts of any previous operator, or because it had declined to answer a credit questionnaire giving details of the acquisition of the property and its financial condition (R. 1187-88). He submitted to the jury the issue whether the defendants used the arbitration provision in the standard contract as a lever to force the plaintiff to make undesired and unfavorable arrangements with respect to the showing of pictures (R. 1179-80).

The judgment was entered for the defendants chiefly on the ground that damages had not been established with sufficient certainty.

THE QUESTIONS PRESENTED.

1. Whether the statutes of limitations of both Massachusetts and Oklahoma apply to this action.

2. Whether, in an action under the anti-trust laws, the statute begins to run before the discovery of the conspiracy by the plaintiff.

3. Whether the statute of limitations commences to run against a continuing conspiracy in violation of the anti-trust laws.

4. Whether the running of the statute is suspended by the Clayton Act, 15 U.S.C.A. 16, by the pendency of the two Government suits to condemn the standard contract and arbitration conspiracies as to the entire causes of action, or only as to the injuries resulting from those conspiracies.

5. Whether the running of the statute against a private right of action alleging a nation-wide conspiracy is suspended by the pendency of various Government suits to restrain the operation of local segments of this conspiracy.

6. Whether the findings and conclusions entering into the judgment in Oklahoma No. 6516 constitute an estoppel here.

7. Whether the findings and conclusions in Oklahoma No. 6517 constitute an estoppel as to the business

dealings of the assigning corporations with the defendants and upon the issues of injury and damage.

8. Whether the judgment for Warner in Oklahoma No. 6517 is *res judicata* as to Vitagraph.

9. Whether the plaintiff has established with reasonable certainty that injury to the assigning corporations was caused by the defendants' violations of the anti-trust laws.

10. Whether a plaintiff is entitled to recover all the damage sustained by his opposition to a criminal conspiracy, if the damage would have been less by yielding to it.

11. Whether the entire standard exhibition contract, including the booking provisions, was illegal, or only the arbitration provision.

12. When two or more causes contribute to the injury, one or more of which is not a basis of liability, whether a plaintiff is required to establish the extent of the injury, in dollars and cents or in percentage, contributed by each cause.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Apparently this Court has not decided whether, because of a "borrowing" provision of the law of the forum, the statutes of limitations both of the forum and of the State where the cause of action arose apply to an action under the anti-trust laws; or when the statute begins to run against a continuing conspiracy; or whether, in an action at law, as distinguished from a suit in equity, the statute may start running before the discovery of the conspiracy.

2. The decision gives only a limited effect to the section of the Clayton Act tolling the statute of limitations against a private right of action by the pendency of a Government suit. This Court has never determined the scope and purpose of that section, and, until the decision of the court below, no circuit court of appeals had passed upon it. In view of the number of proceedings by the Government in recent years, especially in connection with the motion picture industry, the administration of the anti-trust laws would be greatly facilitated by an authoritative pronouncement, particularly as to the application of the words "in whole or in part" in that section.

3. The judgments of the court below are probably in conflict with the decisions of this Court holding that only facts found in a prior action that were the basis of the judgments constitute an estoppel in a subsequent action, and with the decisions of this Court and of several circuit courts of appeals to the effect that only ultimate facts determined in the prior action, and not evidentiary facts, may constitute an estoppel.

4. They are also probably in conflict with the decisions of this Court by ruling that findings of fact, particularly as to injury and damage, in a prior action by the same plaintiff against different defendants constitute an estoppel; by holding in effect that findings in a prior action by the assignee of the claims of various corporations are conclusive for or against him in a subsequent action as assignee of the claims of other corporations; and by ruling that the ownership by Warner of all the capital stock of Vitagraph constituted privity or identity of parties so as

to make the Oklahoma judgment in favor of Warner *res judicata* here.

5. Apparently it has not been determined by this Court whether or to what extent the doctrine of estoppel by judgment may be enforced to bar recovery under the anti-trust laws when there has been a substantial growth or development, since the entry of the prior judgment, of the legal principles governing anti-trust litigation in the industry.

6. The decision appears to be in conflict with the opinions of this Court relating to damages under the anti-trust laws. It disregards the distinction between certainty as to the fact of injury and certainty as to the extent of the damage; and substantially whittles down the effect of those opinions. It prescribes a novel rule that a plaintiff in an anti-trust action who has been damaged by an unlawful act of the defendants and by other causes, acting concurrently, must specify the amount of the damage attributable to the defendants' unlawful acts, either in percentage or in dollars and cents. In effect it requires the detailed opinion of an expert whenever more than one cause contributes to an injury, instead of allowing a jury to make a reasonable approximation of the damage from the evidence presented; and creates a difficult, if not an impossible, standard of proof.

7. The decision also appears to be in conflict with the rulings of this Court that condemned the standard contract-arbitration conspiracy. It denies recovery on the ground that only the arbitration provision of the standard contract was illegal; that the remaining clauses were valid and enforceable, notwithstanding the adoption of the con-

tract by agreement of substantially all the leading distributors; that the assigning companies were legally obliged to perform such contracts; and that they did not suffer any actionable injury from being coerced through the arbitration provision into playing and paying for the films covered by the contracts or into substituting new obligations that caused losses.

8. In effect the rulings nullify the decisions of the jury on the issues on which the action was submitted; that is, that the plaintiff might recover if the defendants used the arbitration provision as a lever to enforce compliance with other clauses of the contract or to coerce the assigning corporations into making injurious contracts for additional pictures. It disregards the uncontradicted evidence that in two localities the distributors refused to supply necessary films because the plaintiff had declined to furnish credit statements.

9. If not reversed, this decision will undoubtedly be used as a precedent in the very large number of civil actions under the anti-trust laws now pending against these defendants and affiliated corporations and other motion picture companies, and will in all probability be a serious obstacle, if not an absolute bar, to the proof of damages in many of those actions.

WHEREFORE your petitioner respectfully prays that a writ of *certiorari* be issued by this Honorable Court, directed to the Circuit Court of Appeals for the First Circuit, commanding that Court to certify and to send to this Court, on a day certain to be named therein, a full and complete transcript of the record and of all the proceedings material to the appeal of the petitioner in *A. B. Momand* v.

Universal Film Exchanges, Inc. et al., No. 4291, to the end that the case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief as to this Court may seem just and proper.

By his attorney,

GEORGE S. RYAN,
6 Beacon Street,
Boston, Mass.,

MARCH ....., 1949.

Supreme Court of the United States

October Term, 1948

No.

A. B. MOMAND,

VERSUS

UNIVERSAL FILM EXCHANGES, INC. ET AL.

BRIEF IN SUPPORT OF PETITION.

OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals for the First Circuit (R. 2015-35) probably will be reported in 171 F. 2d. The opinions of the District Court of the District of Massachusetts (R. 91-125; R. 187-246) are reported in 43 F. Supp. 996 and 72 F. Supp. 469.

JURISDICTION.

The opinion of the Court of Appeals was filed December 21, 1948. Jurisdiction of the Court to issue the writ applied for is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Title 28, United States Code, s. 1254 (1).

STATEMENT OF THE CASE.

The summary statement of the matters involved in the petition sets out the material facts. As far as necessary it will be supplemented in other portions of this brief.

SPECIFICATION OF ERRORS.

The statements in the petition of the questions presented and of the reasons relied on for the allowance of the writ show the errors intended to be urged. For the sake of brevity they will not be repeated here.

ARGUMENT.

Summary.

The questions presented naturally fall into three groups according to subject matter; (1) Statute of Limitations; (2) Estoppel by judgment and *res judicata;* and (3) Damages. They will be argued briefly in that order.

STATUTE OF LIMITATIONS.

1. The Statutes of both Massachusetts and Oklahoma Should not have been Applied.

Because of a "borrowing" provision in the statute of the forum the courts below ruled that the statutes of limitations of both jurisdictions applied to this action.

Even though a borrowing provision may substitute the statute of the State where the cause of action arose for the law of the forum —

Cope v. *Anderson*, 331 U.S. 461, 463 —

there is no reason for applying the limitations in both statutes to an action so strongly approved by the public policy of this nation. The statute relates to the remedy, not to fundamental rights, and is used merely as a measure of necessity or convenience, to supply the omission in the Act of Congress.

Chase Securities Corp'n v. *Donaldson*, 325 U.S. 304, 314.
Holmberg v. *Armbrecht*, 327 U.S. 392, 395.
Chattanooga Foundry & Pipe Works v. *Atlanta*, 203 U.S. 390.

For that purpose it is sufficient if there is a State statute providing a reasonable rule applicable to similar causes of action. It is not necessary to graft upon it the law of another State and thereby saddle a plaintiff with the limitations of both jurisdictions.

See *Bluefields S. S. Co.* v. *United Fruit Co.* (C.C.A. 3), 243 Fed. 1, 20.

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2. The Statute does not Run until Discovery of Conspiracy.

The Court of Appeals did not pass upon the contention of the plaintiff that in an action under the anti-trust laws the statute of limitations does not commence to run until the discovery of the conspiracy by the plaintiff. Apparently this question has not been determined by this Court, unless the denial of *certiorari* in *Special Site Sign Co.* v. *Foster & Kleiser Co.*, 299 U.S. 613, may be construed to be such an adjudication. There is some conflict of opinion in the circuit courts of appeals.

American Tobacco Co. v. *People's Tobacco Company* (C.C.A. 5) 204 Fed. 59, 60, 62, 63.

Foster & Kleiser Co. v. *Special Site Sign Co.* (C.C.A. 9) 85 F. 2d 742, cert. den. 299 U.S. 613.

Oklahoma ex rel. v. *American Book Co.*, (C.C.A. 10) 144 F. 2d 585, 587.

Here it is respectfully submitted that the equitable doctrine in cases of fraud should be applied in a Federal Court to an anti-trust action, and that the cause of action does not arise, and the statute does not start running, until the injured party has knowledge, or reasonable grounds to believe in the existence, of the conspiracy.

Holmberg v. *Armbrecht*, 327 U.S. 392, 397.
Bailey v. *Glover*, 21 Wall. 342.

The statement of agreed facts on which the issue was tried contains no stipulation as to the time of discovery of the conspiracy (R. 82-91). But a conspiracy to destroy the plaintiff's companies obviously would be of such a nature as to conceal itself; and usually the statute of limitations is an affirmative defense, to be pleaded and proved by the party relying upon it. See—

Blackler v. *Booth*, 114 Mass. 24, 26;
Miller v. *Aldrich*, 202 Mass. 109, 113;
Gallagher v. *Wheeler*, 292 Mass. 547, 550.

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3. The Statute does not Run until Cessation of Continuing Conspiracy.

Apparently this Court has not determined in a civil action when a statute of limitations commences to run against a continuing conspiracy to violate the anti-trust

laws. In a criminal prosecution it is well established that the statute does not run until the end of the conspiracy.

United States v. *Kissell*, 218 U.S. 601.
Eldredge v. *United States* (C.C.A. 10) 62 F. 2d 449, 450.
Patterson v. *United States* (C.C.A. 6) 222 Fed. 599.

In *Foster & Kleiser Co.* v. *Special Site Sign Co.* (C.C.A. 9) 85 F. 2d 742, 751, cert. den. 299 U.S. 613, it was held that the cause of action arose and the statute ran from the time the damage was sustained. In *Northern Kentucky Telephone Co.* v. *Southern Bell Telephone Co.* (C.C.A. 6), 73 F. 2d 333, 335, 97 A.L.R. 130, annotation 133, there is a dictum to the effect that the statute begins to run when there is an overt act, or the last of a contemplated series of overt acts.

There are some decisions, not under Federal laws, to the effect that in the case of a continuing conspiracy or other wrong the statute does not run until the cessation of the acts constituting the wrong.

Montgomery v. *Crum*, 199 Ind. 660, 678-9, 161 N.E. 251.
Rowe v. *Gatke Corpn.* (C.C.A. 7) 126 F. 2d 61, 66; pet'n dism. 317 U.S. 702.
Goodall Co. v. *Sartin* (C.C.A. 6) 141 F. 2d 427, 435, cert. den. 323 U.S. 709.

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4. Effect of Government Suits in Tolling Statute.

The decisions of the courts below are to the effect that by the Government suits to condemn the standard contract-arbitration and the credit committee conspiracies the running of the statute was suspended only as to the portions

of the plaintiff's causes of action based upon those practices (Conc. 30-31, R. 121-23; R. 2031-32). The plaintiff submits that the bar was lifted as to the entire causes of action, because they were based "in whole or in part" on the matters complained of in the Government suits.

The material portion of the Clayton Act (15 U.S. C.A. 16) is as follows:

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Obviously the purpose of the Congress was to prevent the running of the statute where a private litigant had a cause of action based in any degree upon the "matter complained of" in a pending Government suit. But the interpretation by the courts below strikes out the words "in part" from the section, and tolls the statute only as to the rights of action based "in whole" upon the subject matter of the Government suits.

The courts below gave no effect to the other Government suits. Although the plaintiff's causes of action were not based upon monopolistic practices occurring in localities such as in Los Angeles or Chicago, they were grounded in part upon practices of the same nature as those alleged in the Government suits. The conspiracies attacked by the Government were not independent combinations or agreements, but segments or outcroppings of a nationwide con-

spiracy. The concert of action by which the assigning companies were injured was likewise merely a manifestation of the same vast conspiracy.

ESTOPPEL BY JUDGMENT AND RES JUDICATA.

1. No Estoppel by Judgment and Findings in Oklahoma No. 6516.

It is respectfully submitted that the findings in Oklahoma do not constitute an estoppel here, for several reasons:

A. Plaintiff as Assignee sued in Massachusetts in Different Capacity.

It seems clear that a former judgment is not an estoppel unless the party has appeared in the same character or capacity in both actions.

Reynolds v. *Stockton*, 140 U.S. 254.

Lyon v. *Perin & Gaff Mfg. Co.*, 125 U.S. 698.

Troxell v. *Delaware L. & W. R. Co.*, 227 U.S. 434, 443.

In *Commissioner* v. *Sunnen*, 333 U.S. 591, this Court apparently decided that an earlier judgment based upon one assignment is neither *res judicata* nor a collateral estoppel in a subsequent tax proceeding based upon a different assignment. The decisions of the courts below seem to conflict with that decision by holding that the judgment in Oklahoma No. 6516 was conclusive against the plaintiff, who was suing in Massachusetts upon assignments different from those involved in that action.

B. Oklahoma Findings as to Conspiracy not Basis of Judgment.

The Oklahoma judgments were based upon the findings that there was no damage to any of the assigning corporations by reason of the generic conspiracy to the limited extent found. The findings as to this conspiracy, therefore, were not essential to the determination of either of those actions, and cannot constitute an estoppel here.

Cromwell v. *County of Sac*, 94 U.S. 351, 352-53.

Southern Pacific R. R. Co. v. *United States*, 168 U.S. 1, 48-49, 50-51.

Oklahoma v. *Texas*, 256 U.S. 70, 85.

County Commissioners v. *Block*, 99 U.S. 686-99, 25 L. ed. 491, 493.

Russell v. *Place*, 94 U.S. 606, 608, 609.

Restatement of Judgments, s. 68, p. 308.

Landon v. *Clark* (C.C.A. 2) 221 F. 841.

Moran Towing Co. v. *Sunset Lighterage Corporation* (C.C.A. 2) 62 F. 2d 761.

Olsen v. *Olsen*, 294 Mass. 507.

Schofield v. *Rideout*, 233 Wis. 550, 290 N.W. 155, 133 A.L.R. 834, and authorities reviewed in annotation.

C. A Judgment is an Estoppel Only as to Ultimate Issues.

The law seems clear that only findings of ultimate facts, as distinguished from evidentiary facts, may constitute an estoppel.

Norton v. *Larney*, 266 U.S. 511, 517.

Reynolds v. *Stockton*, 140 U. S. 254, 35 L. ed. 464, 469.

Last Chance Mining Co. v. *Tyler Mining Co.*, 157 U.S. 683, 691.

The Evergreens v. *Nunan* (C.C.A. 2) 141 F. 2d 927, 152 A.L.R. 1187, and annotation.

United States v. *Five Cases* (C.C.A. 2) 156 F. 2d 493.

United States F. & G. Co. v. *McCarthy*, (C.C.A. 8) 33 F. 2d 10, 70 A.L.R. 1447;

Paulos v. *Janetakos*, 46 N.M. 90, 129 P. 2d 636, 142 A.L.R. 1237, and annotation.

King v. *Chase*, 15 N.H. 9, 41 Am. Dec. 675.

Here the ultimate issues were whether the assigning corporations had been injured and damaged by reason of the defendants' violations of the anti-trust laws. The cause of action is "the injury under the circumstances under which it took place."

Berube v. *Horton*, 199 Mass. 421, 425, 84 N.E. 474, quoted with approval in—

Baltimore S. S. Co. v. *Phillips*, 274 U.S. 316, 321.

Reeves v. *Beardall*, 316 U. S. 283, 285, citing—

Atwater v. *North American Coal Corp.*, (C.C.A. 2) 111 F. 2d 125, 216.

D. Development of Anti-Trust Law Makes Doctrine of Estoppel Inapplicable.

Since the entry of the judgments in Oklahoma there have been a number of decisions by this Court and other courts in anti-trust actions affecting the motion picture industry, beginning with *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, and ending with *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, which demonstrate that in many respects the findings and conclusions were based upon erroneous theories of the law. By these

decisions the legal situation was vitally altered and the "legal atmosphere" so changed as "to render the rule of collateral estoppel inapplicable."

Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591, 600.
Blair v. *Commissioner*, 300 U.S. 5.
Friend v. *Talcott*, 228 U.S. 27, 41.

The doctrines of *res judicata* and collateral estoppel, even if normally applicable, should not therefore be enforced here, in an action so strongly favored by the public policy of the nation, to aid the defendants in avoiding the consequences of their illegal activities.

Mercoid Corporation v. *Mid-Continent Investment Co.*, 320 U.S. 661, 670.
Package Closure Corp'n v. *Sealright Co.*, (C.C.A. 2) 141 F. 2d 972, 978.
Maltz v. *Sax*, (C.C.A. 6) 134 F. 2d 2.

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2. No Estoppel by Judgment and Findings in Oklahoma No. 6517.

Because two actions were tried together in Oklahoma, it was apparently a convenience to the trial judge to make consolidated findings, not only as to the generic conspiracy, but also in regard to the dealings of all the Momand companies with all the defendants. He made findings, for example, under the title "Block Booking in Oklahoma," that related to the requirement that films be booked by the Momand companies in the order of release, and to the delays or delinquencies of those companies in booking films (Ct. Ex. 3, p. 388; pars. 98 and C-11, pp. 1339-41). Without attempting to distinguish between separate cor-

porations, he grouped all together and made "lump" findings in regard to their relations to all the distributors.

The plaintiff contended that even if the findings constituted an estoppel as to the elements of the generic conspiracy, they were not an estoppel in regard to injury or damage to the assigning corporations here or in regard to the business dealings of those assigning corporations and the defendant distributors.

On several occasions the trial judge ruled that the Oklahoma findings as to causation and damage were not an estoppel (see R. 76, 107-8, 1177, and as to admission of evidence R. 553, 758, 778-99). He charged the jury that it was for them to decide whether the defendants "used that arbitration provision as a lever to make a new arrangement with respect to the showing of pictures, which arrangement was undesired by the plaintiff and was unfavorable to him" (R. 1179). But in his opinion he relied as an estoppel upon the Oklahoma findings that the insistence that Momand accept the films in the order of release or on the day booked for display was not the result of concert of action of the distributors (R. 195-96); and he ruled that "If the claim is that defendants collectively conspired to use the arbitration machinery as a lever to procure particular playing dates or contractual arrangements which caused loss to the plaintiff's companies, that claim is foreclosed by estoppel by judgment" (R. 195).

The Court of Appeals pointed out that in Oklahoma it was "found that the defendants had not conspired with respect to the selection or timing of motion picture bookings" and concluded that "Damage from these sources is, therefore, not open to proof * * *" (R. 2020).

Obviously these rulings constituted important bases for the opinion that the plaintiff had not established actionable damage. It is strongly urged, however, that they were erroneous. In Oklahoma No. 6516 there was no issue in regard to the business dealings of the assigning corporations here with the defendants, either as to the time or method of booking, or as to damages resulting from practices directed against these corporations. The findings in regard to those practices in No. 6517, between the plaintiff and other parties, obviously are not binding here.

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3. No Estoppel as to Different Cause of Action.

It is respectfully submitted that the plaintiff was improperly deprived of the right to show that his operating companies were destroyed by a local conspiracy or by monopolistic practices directed specifically against them, because, irrespective of the form of pleading, the injuries sustained are the foundation of the cause of action.

The Court of Appeals conceded that conspiracy not previously charged would be open to proof, but stated that "a conspiracy to destroy a business must take specific forms to achieve that end," and that the plaintiff did not offer anything "beyond the twenty already familiar business practices involved" (R. 2029).

It is urged, however, that the rulings of the trial judge severely restricted the plaintiff in the presentation of his evidence; and that, as stated hereinafter (*infra, Damages,* sec. 1), even on the limited evidence the jury might have found a specific conspiracy to destroy the Momand organization.

DAMAGES.

1. The Assigning Corporations Sustained Actionable Injury.

The first ground of the judgment was in substance that the plaintiff's assignors did not sustain any legal injury because of the arbitration conspiracy, apparently on the theory that they did not pay any awards (R. 192-201; R. 2019).

The purpose of an arbitration threat or complaint, however, was not to secure an award of a few dollars for a film shipped and rejected, but to compel exhibitors to play undesirable product that had been "block booked" to them. Each complaint demanded *bona fide* dates and payment for all unplayed films on all contracts listed. Because of the threats and complaints the operating companies gave dates and played pictures at detrimental times. To settle the arbitration complaints they dated old films, and entered into contracts for new and old product. They played the old pictures at a substantial loss.

When payment was made for the films listed in the arbitration complaints, or for other films substituted by new contracts, the objects of the arbitration conspiracy were attained. But in the process the assigning corporations were ruined.

Apparently it was the view of both the courts below that the plaintiff's companies were legally obliged to perform the standard exhibition contracts; that the use of unlawful devices to compel performance was not actionable;

and that the business arrangements made to settle the arbitration complaints were voluntary (R. 196; 2019-20).

But the plaintiff's uncontradicted evidence demonstrates that the defendants had failed to perform their contractual obligations; that they had refused to supply him with films when new and valuable and had insisted upon his playing old and worthless pictures; that until late in 1930 none of the defendants except Metro and Fox had contracts providing for the exhibition of films in the order of release, but that, beginning in 1929, all the defendants required that he book pictures in that order, and had even refused to supply features until short subjects covered by separate contracts had been exhibited; and that in other ways the defendants had violated their contracts and had created insuperable difficulties in the booking and playing of their films. The plaintiff's companies were therefore excused from performing the contracts.

In any event it is submitted that the defendants could not lawfully have compelled the performance of any standard contract. The entire contract was illegal. The evil was not so much the arbitration provision as the compulsion exerted upon independent exhibitors by a combination of dominant distributors. See—

Fox Film Corp. v. *Muller*, 296 U.S. 207;

Fox Film Corp. v. *Muller*, 192 Minn. 212;

Binderup v. *Pathe Exchange, Inc.*, 263 U.S. 291;

Fox Film Corp. v. *Tri-State Theatres*, 51 Ida. 439;

United Artists Corpn. v. *Odeon Building, Inc.*, 212 Wis. 150;

Universal Film Exchange v. *West*, 163 Miss. 272;

Vitagraph, Inc. v. *Theatre Realty Co.* (D.C.) 50 F. 2d 907, 908;

Pl. Ex. 2, R. 390, par. III, R. 1545-46.

Even if the arbitration clause alone were invalid, it is not severable from the other provisions of the contract. See—

Katzinger Co. v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394, 401;

Mac Gregor v. *Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402, 407.

It may also be suggested that by reason of *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 141-48, it is doubtful whether any license contract made by any of the defendants with any independent exhibitor was lawful. Their entire system of doing business was permeated with illegality.

Being illegal the contracts of the defendants with the Momand companies were unenforcible in any court of justice.

Sola Elec. Co. v. *Jefferson Elec. Co.*, 317 U.S. 173, 177.

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U.S. 346.

Cf. Mercoid Corpn. v. *Mid-Continent Investment Co.*, 320 U.S. 661, 671.

The reasoning of the courts below (R. 197-201, 72 F. Supp. 469, 476-477; R. 2019-20), that a person harmed or threatened with harm by an unlawful conspiracy must keep the damages within a limited scope, is of

novel impression in anti-trust litigation. In substance it requires that the victim should yield to a conspiracy if subsequently such a course might prove less expensive than opposing it. It ignores the fact that the purpose of the conspiracy was to get old and worthless pictures exhibited.

Irrespective of any issue of injury by a nation-wide conspiracy, it urged that the jury were warranted in finding a local conspiracy to ruin the Momand companies. Subsequent to the conflict in regard to arbitration and credit practices, relating chiefly to Alva and Clinton, the defendants simultaneously released an attack upon the plaintiff's companies by substantially every practice that could be devised to destroy an exhibitor: arbitration threats and complaints, refusal to book films normally, and insistence, in violation of contract, that the films be played in the order of release, resulting in the exhibition of old and worthless pictures; refusal to supply necessary films; promotion of competition and cooperation with competitors; and over-supply of films to competitors, including Griffith, a Universal subsidiary. The substantial unanimity of action of the distributors can scarcely be attributed to accident or coincidence. It was a novel and important departure from prior practices, which, unexplained, indicated a conspiracy.

Interstate Circuit, Inc. v. *United States,* 306 U.S. 208, 222-23.

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2. Certainty of Injury and Damage.

The second chief ground of judgment was that the plaintiff had not established damages with sufficient cer-

tainty; that is, that because of other contributing causes he had not proved the amount of damage resulting from the defendants' illegal activities, either in percentage of the total loss or in dollars and cents (R. 201, 202, 204, 206; R. 2020-23).

This view clearly is in conflict with the decisions of this Court and of other well-reasoned opinions on damages under the anti-trust laws, distinguishing between certainty as to the fact of injury and certainty as to the amount of the damage, and holding that the evidence need only show the extent of the damages as a matter of reasonable inference.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359.

Story Parchment Co. v. *Paterson Parchment Co.*, 282 U.S. 555.

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251.

Package Closure Corpn. v. *Sealright Co.*, (C.C.A. 2) 141 F. 2d 972.

Rankin Co. v. *Associated Billposters* (C.C.A. 2) 42 F. 2d 152.

American Can Co. v. *Ladoga Canning Co.* (C.C.A. 7) 44 F. 2d 763; cert. den. 282 U.S. 899.

Straus v. *Victor Talking Machine Company*, (C.C.A. 2) 297 F. 791.

Cf. Bausch Machine Tool Co. v. *Aluminum Co.* (C.C.A. 2) 79 F. 2d 217.

It is in apparent conflict with other decisions of this Court relating to the ascertainment of damages uncertain in amount.

Palmer v. *Connecticut R. & Lighting Co.*, 311 U.S. 544, 559, 561-2;

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 679, 687, 688;
Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406-408.

It seems to ignore or to misapply the principle that if the wrongful conduct of a defendant concurs with the acts of another person or with the operation of natural forces to destroy the business of a plaintiff, he is liable for all the injurious consequences. He is not relieved of responsibility, wholly or in part, by the simultaneous operation of the other forces.

Miller v. *Union P. R. Co.*, 290 U.S. 227, 234-36.
Kreigh v. *Westinghouse, C. K. & Co.*, 214 U.S. 249, 257.
Wilmington Star Mining Co. v. *Fulton*, 205 U.S. 60, 75.
Gila Valley, C. & W. R. Co. v. *Lyon*, 203 U.S. 465, 473.
Washington & G. R. Co. v. *Hickey*, 166 U.S. 521, 527.

In any event the plaintiff attributed the damages in various localities during specified periods either to the standard contract and credit conspiracies (R. 650-51), or the credit practices alone (R. 687-8), or to several causes in specified proportions (R. 836-38, 861-2, 864-5, 911-12, 926).

CONCLUSION

It is therefore respectfully urged that this case is one calling for the exercise by this Court of its supervisory powers, and that a writ of *certiorari* should issue to the Circuit Court of Appeals for the First Circuit, and that

this Court should review the decisions of that Court and of the District Court for the District of Massachusetts.

Respectfully submitted,

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Boston, Mass.,
Attorney for Plaintiff.

MARCH, 1949.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 647

A. B. MOMAND
Petitioner

v.

UNIVERSAL FILM EXCHANGES, INC., LOEW'S INC., METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, VITAGRAPH, INC., RKO DISTRIBUTING CORPORATION, UNITED ARTISTS CORPORATION, COLUMBIA PICTURES CORPORATION
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (R. 2015-2035) is reported at 172 F. 2d 37. The opinions of the United States District Court for the District of Massachusetts (R. 91-125; 187-246) are reported at 43 F. Supp. 996 and 72 F. Supp. 469.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on December 21, 1948 (R. 2035). The petition for a writ of certiorari was filed on March 17, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254 (1).

QUESTIONS PRESENTED

1. The primary question presented by this petition for review of the disposition of this action, the fourth suit brought by the petitioner involving the same basic claims against the respondents herein as defendants or as co-conspirators, is whether Congress intended the doctrines of res judicata and collateral estoppel not to apply to litigation under the anti-trust laws.

2. Questions concerning the application of Statutes of Limitations in private anti-trust actions are also presented, but, for the reasons hereinafter set forth, these are of minor consequence.

3. The ultimate question of whether the evidence warranted the submission of the petitioner's case to the jury is, of course, presented, but, in view of the fact that this evidence was the same as that introduced in the prior litigation, the disposition of this issue would necessarily be governed by the resolution of the issues raised by the first question presented above.

STATEMENT

The petitioner's statement of the case is not accurate. The respondents present herewith a statement of the case which they believe to be accurate and necessary for a proper consideration of the petition.

The case at bar is the fourth anti-trust action brought

by this petitioner, as plaintiff, involving the same basic claims, in each of which the respondents herein were named as defendants or as co-conspirators. So far as any of these actions resulted in any judgment affecting the respondents, either as defendants or as co-conspirators, the judgment in each action has been in favor of the respondents.

The four actions are:

Oklahoma No. 4520. Begun by the petitioner in the District Court of the United States for the Western District of Oklahoma April 17, 1931 as assignee in his own right under assignments dated April 13, 1931 from theatre corporations operating in Oklahoma. In 1934 further assignments dated December 31, 1933 were alleged. This action was dismissed April 19, 1937 by the petitioner rather than to comply with an order directing the filing of an amended complaint (R. 99, 104).

Oklahoma No. 6516. Begun by the petitioner in the District Court of the United States for the Western District of Oklahoma April 1938 as assignee under the same two sets of assignments hereinbefore described. Tried 1942-1943 before United States District Judge Browder Broaddus without a jury. Terminated August 16, 1944 in judgment on the merits for all of the respondents herein. Judgment never appealed by the petitioner (Court's Exhibits 1, 3, 4, R. 388, 1258, 1261, 1389).

Oklahoma No. 6517. Begun by the petitioner in the same Oklahoma District Court April 1938 as assignee under the same two sets of assignments. This action was consolidated and tried with 6516, and terminated August 16, 1944 in judgment on the merits for a defendant privy to the respondent Vitagraph herein and in favor of all other defendants in Oklahoma excepting two, *not parties here*, in respect to whom a comparatively small recovery was paid for individual tortious acts, in respect to which the respondents herein were found to be innocent. This judg-

ment was likewise never appealed by the petitioner (Court's Exhibits 2, 3, 5, R. 388, 1259, 1261, 1431).

Massachusetts No. 7024. Begun by the petitioner in the District Court for the District of Massachusetts June 7, 1937 as assignee under the same two sets of assignments. Trial before Judge Wyzanski and a jury terminated February 13, 1947 in a judgment on the merits for all of the respondents after a verdict for the petitioner had been set aside by Judge Wyzanski (R. 186). It is this judgment, unanimously affirmed by the Court of Appeals (R. 2015), which the petitioner seeks to review here.

As appears from the above, the present litigation began April 17, 1931 with a suit brought on that day in the Oklahoma District Court (No. 4520) under the anti-trust laws by this petitioner, claiming for his own benefit under assignments* made April 13, 1931 (R. 83, 99) by some fifteen corporations in which the petitioner and his father were principal stockholders engaged in operating, managing or leasing motion picture theatres in twelve cities or towns in Oklahoma (R. 355-356) against a number of corporate defendants and asserting alleged wrongs commencing about 1927 under a conspiracy alleged to have been formed about 1922. By amendment filed August 27, 1934, petitioner introduced further assignments to the petitioner dated December 31, 1933 by these same corporations against all of the respondents herein except Loew's (R. 104, 117).

All of the respondents herein were defendants in that suit. Other defendants were also named. The basic causes of action alleged (called the "generic conspiracy") were, with minor exceptions, the same as those alleged in the instant case (R. 116).

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*Respondents urged below, and would maintain here, that these assignments were for causes of action in tort and hence invalid under Oklahoma law. *Kansas City M. & O. R. R.* v. *Shutt*, 24 Okla. 96, 104 Pac. 51, 53.

After certain interlocutory proceedings, the petitioner was ordered to make his complaint more definite and certain. This he declined to do and, accordingly, the District Court dismissed his complaint (R. 83). The Circuit Court of Appeals for the Tenth Circuit, by mandate entered in April 1937, affirmed the dismissal but "without prejudice" (R. 99, 104).

The petitioner thereupon split his litigation into three parts:

1. In June 1937 he instituted the present action in Massachusetts as assignee under the same two sets of assignments against the respondents — eight distributors of motion pictures who had been parties to the original Oklahoma 4520 suit brought in 1931 (R. 92). This action was based on a claim that the distributors had about 1922 entered into a "generic conspiracy" manifested by participation in the standard exhibition contract*, the maintenance of credit committees, and attempts to monopolize and restrain trade in some twenty different ways, and that this "generic conspiracy" and its manifestations had resulted in damage to ten of the assignor corporations (R. 12-66). This same "generic conspiracy" was the basis of all of the subsequent litigation.

2. In an action brought in Oklahoma in 1938, numbered 6516, the petitioner sued as assignee under the same two sets of assignments of seven of the corporations which had been named in Oklahoma 4520. The respondents herein, or their privies, were the named defendants in this action. While five of these assignor operating corporations were different from those described in the present action, two assignors were the same and the complaints were otherwise substantially identical in substance as those alleged

*The standard exhibition contract had resulted from a trade conference initiated and presided over by the Federal Trade Commission and had been approved by that Commission (see *United States* v. *Paramount Famous Lasky Corp.*, 34 F. 2d 984, 986).

in Massachusetts 7024. (Compare R. 12-66 with Court's Exhibit 4, R. 388, 1389-1431.)

3. On the same day petitioner brought Oklahoma action No. 6517 as assignee under the same two sets of assignments of all fifteen of the assignor corporations. The defendants named were, with the exception of Warner Brothers Pictures, Inc. (found to be privy to Vitagraph), different from the defendants named as such in Massachusetts 7024 or in Oklahoma 6516, although these defendants all were named as co-conspirators in both of these actions. Similarly, the defendants in Massachusetts 7024, respondents herein, all were named as co-conspirators in Oklahoma 6517. The "generic conspiracy" was the same, and expressed in substantially the same language, as was alleged in Oklahoma 6516 and in Massachusetts 7024. (Compare R. 12-66 with Court's Exhibits 4 and 5, R. 388, 1389-1431.)

The following table shows graphically the designations of the respondents and their privies in the three actions.*

DEFENDANTS IN MASSACHUSETTS 7024 AND WARNER BROTHERS PICTURES, INC. SHOWN IN RELATION TO THEIR POSITION AS DEFENDANTS OR AS ALLEGED CO-CONSPIRATORS IN SAID ACTION AND IN OKLAHOMA 6516 AND OKLAHOMA 6517.

(Abbreviated Names Used)

Corporation	*Massachusetts 7024*	*Oklahoma 6516*	*Oklahoma 6517*
Universal	Defendant	Defendant	Co-conspirator
Loew's	Defendant	Defendant	Co-conspirator
Metro	Defendant	Co-conspirator	Co-conspirator
Fox	Defendant	Defendant	Co-conspirator
RKO	Defendant	Defendant	Co-conspirator
United Artists	Defendant	Defendant	Co-conspirator
Columbia	Defendant	Defendant	Co-conspirator
Vitagraph	Defendant	Defendant	Co-conspirator
Warner Brothers	Co-conspirator	Co-conspirator	Defendant

*References: Court's Exhibit 3, R. 388, 1262-1264; Court's Exhibit 4, R. 388, 1389-1391; Court's Exhibit 5, R. 388, 1432. Metro was the film-distributing subsidiary of Loew's and Vitagraph was that of Warner Brothers.

Oklahoma 6516 and 6517 were consolidated and tried together by the same counsel before Judge Broaddus without a jury, in a protracted trial which began in December 1942 and ended in the middle of 1943. In that action the issues were drawn between the petitioner suing in his own interest, on the one side, and the respondents in the case at bar, on the other, named either as defendants or as co-conspirators with respect to the same "generic conspiracy" averred to have been operative in twelve municipalities in Oklahoma, which included all seven of the municipalities specified in the instant action.

Judge Broaddus by his findings and judgments determined, so far as presently pertinent, that the respondents had not conspired and that they were not guilty of any breach of the anti-trust laws, excepting two technical violations relating to the use of the standard exhibition contract and credit committee matters, and that, although these were violations of the anti-trust laws, they did not cause the petitioner's assignors any damage (Court's Exhibit 3, R. 388, 1331-1341, 1344-1379). "Paramount" and "Griffith," defendants in Oklahoma 6517 but not defendants in the case at bar, were found to have damaged certain of the petitioner's assignors in comparatively small sums by tortious conduct *not* a part of the "generic conspiracy," and Judge Broaddus, after some procedural doubts, permitted recovery in 6517 for these torts, even though not part of the "generic conspiracy" (*Id.* at 1382-1388). These judgments in relatively small amounts have long since been paid.

About two and half years later, the trial of the present action before District Judge Wyzanski and a jury began in January 1947. There had been previous consideration by Judge Wyzanski of the defense of the Statute of Limitations which had been asserted by the defendants, and, as a result of which, Judge Wyzanski had established certain periods within which the petitioner's proof was to be laid

(R. 91-125). In fact, the matter of the Statute of Limitations proved not to be of particular consequence, since Judge Wyzanski permitted the petitioner to go back to May 6, 1928 as to the matters left open to him by the Oklahoma judgments (R. 121-123). The petitioner, in his opening to the jury, asserted that no damage of any consequence had been suffered by him by reason of the respondents' acts until early in 1928 (R. 356, 368); and there is not the slightest reason to suppose that if any of the rulings relating to the Statute of Limitations complained about had been different the plaintiff's recovery before the jury would have been any greater.

Judge Wyzanski ruled that the petitioner was estopped by the Oklahoma judgments and proceedings to maintain in Massachusetts that the defendants had conspired in a manner in which the Oklahoma Court had held that they had not conspired (R. 190, 191, 305-327). Although at the trial before the jury Judge Wyzanski urged and encouraged the petitioner to offer evidence of conspiracy outside of the bar of the judgments in Oklahoma, the petitioner was unable to do so (R. 955-967). While Judge Wyzanski permitted the case to go to the jury as to certain of the respondents, upon careful and painstaking consideration of the matter after the jury's verdict he concluded that the petitioner had offered no evidence entitling him to the submission of the matter to the jury in respect to any issue as to which he was not already precluded by the prior trials in Oklahoma. It is for this reason that he set aside the verdict and ordered a judgment for the respondents. The detailed reasons of the judge are set forth in his considered opinion (R. 187*).

The Court of Appeals applied the well-settled rules of estoppel by judgment and held that within the area left open to the petitioner by the rulings as to the binding

*It is to be noted that the page references in this opinion are to the stenographic record, not to the printed record.

effect of the prior Oklahoma judgments, he had not offered evidence of matters entitling him to a determination by a jury; rulings of the District Court as to the binding effect of the earlier Oklahoma judgments in this respect and as to the application of the Statute of Limitations were correct; and, accordingly, the Court of Appeals for the First Circuit unanimously affirmed the action of the Massachusetts District Court (R. 2015).

ARGUMENT

1. Notwithstanding the assertion of the petitioner to the contrary, there is nothing in the decision of the Court of Appeals of the First Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. What the petitioner is complaining of are matters which he asserts would have been decided otherwise had the issues which were tried by the Oklahoma District Court been reviewed by an Appellate Court upon an appeal in that case. But this is not anything of which he can take advantage here. His remedy, if there was any error on these matters, which the respondents do not concede, consisted in an appeal which he chose not to take.

2. Assuming the applicability of the doctrines of collateral estoppel and res judicata to anti-trust litigation, there is no question whatsoever as to the correctness of the rulings below. The respondents and their privies were admittedly parties to the consolidated Oklahoma litigation both as defendants and as alleged co-conspirators. (See also Restatement, Judgments, sec. 83, and particularly comment (c) thereunder.) Similarly, there is no real dispute concerning the identity of the basic causes of action, claims, or occurrences in the Oklahoma cases with those asserted by the petitioner in the instant case. Indeed, the petitioner had to assert that all three proceedings — Oklahoma 6516 and 6517 and the case at bar — were the same "action" as Oklahoma 4520 in order to prevent the

Oklahoma Statute of Limitations from operating as a complete bar to recovery, as none of these proceedings were brought within three years from the date of the last assignment, December 31, 1933 (R. 114-116).

3. The petitioner seeks in substance a declaration by this Court that the important considerations of public policy that there be an end to litigation once fully and fairly tried should not be applied in anti-trust cases, and that plaintiff should have two chances to try his cause of action; and, if two, why not three or more? And if a plaintiff is to be given several trial opportunities, why not a defendant? In the nearly three generations since the anti-trust laws were first enacted no one has even remotely suggested such a proposition. The respondents submit that the proposition is as unsound as it is novel. This Court has had occasion to apply the well-recognized principles of estoppel to anti-trust litigation. See *e.g.*, *United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451, 459. Indeed, Congress recognized the applicability of the doctrine in Section 5 of the Clayton Act when it provided that a final judgment or decree in an anti-trust proceeding instituted by the Government should be prima facie evidence in any suit brought by any party *"as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."* 38 Stat. 731, 15 U. S. C. §16. (Italics supplied.)

4. The decision of the Court of Appeals does not deal with any novel or important question of law not previously decided by this Court. The case is unusual only in that the petitioner, by the use of shifts and splits attempted to double his chances for recovery. It was not novel for the Courts below to hold that the petitioner could not so avoid the well-settled principles of res judicata and collateral estoppel. Nor do the factual issues involved in this litigation raise any important questions of motion picture anti-trust law. The fact of the matter is that this more

than twenty-year-old controversy emanated from the petitioner's difficulties in converting from silent to sound motion pictures in the late '20s, a type of motion picture anti-trust litigation not likely to recur in the future. There is involved in these proceedings none of the problems which relate to the recent controversy between the United States and motion picture companies as to what is necessary to bring the conduct of those companies into harmony with the anti-trust laws. The practices which lie at the foundation of the plaintiff's claims were discontinued nearly twenty years ago. The use of the standard exhibition contract and of the credit committee plan were completely discontinued by the end of 1930 (Court's Exhibit 3, R. 388, 1287, 1291). Even if this were a representative action, which it is not, this should be sufficient reason for this Court to decline to grant the petition. For these reasons the respondents respectfully submit that the case is important only to the parties herein and is not an appropriate case for review on certiorari.

5. The decision of the Court of Appeals was right. The best argument for this proposition is the decision of the Court of Appeals itself and the elaborate and painstaking opinion of the District Judge incorporated by reference in that decision (R. 2015, 2020; 172 F. 2d 37; 72 F. Supp. 469).

6. The Statute of Limitations question was rightly decided for the reasons contained in the decision of the District Judge (R. 91-126). The Courts below properly applied the Massachusetts statute. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390. Petitioner concedes this but appears to quarrel with the State legislature for inserting a "borrowing" provision in the statute barring actions which would be barred in the jurisdiction where the cause of action arose (Pet. 22-23). Litigious plaintiffs in search of a forum will find such "borrowing" provisions to be quite common, and they are unquestion-

ably valid. Cf. *Cope* v. *Anderson*, 331 U. S. 461. Such provisions merely adopt, for reasons of public policy, the bar of the state of the plaintiff's residence as a measure of the bar imposed in fact by the law of the forum. *Knight* v. *Moline Ry.*, 160 Ia. 160. Were the wisdom of such legislation before this Court, respondents respectfully submit that any conclusion other than that a state may refuse to provide a haven for outlawed claims would be unthinkable. The petitioner's contention that he did not know of the conspiracy of which he complained and that, therefore, the statute should not be held to begin to run until he had such knowledge, is a strange argument indeed. Apart from the fact that the petitioner cites no authority for any such proposition, the fact is that on April 17, 1931*, the petitioner filed an elaborate declaration in Oklahoma 4520 containing substantially the same charges as those contained in the declaration filed in Massachusetts in 1937 and in the complaints filed in Oklahoma in 1938. Surely he knew at that time of the alleged conspiracy. In any event, as has been stated above, the Statute of Limitations was not an important matter by reason of the petitioner's concessions that no damage of any consequence was suffered by him until early in 1928. The decision of the District Judge permitted him to go back to May 1928 on the two matters left open to him by the decision in Oklahoma, upon which he sought to introduce proof.

7. The petitioner has had two full trials; he obtained, in the first of these, treble recovery for all the damage he was able to establish. Three courts have now held that, after full opportunity, he has failed to establish a case for recovery against these respondents. A reversal by this Court would result only in a new trial and continued litigation. This is so for many reasons, among which are (*a*) as

*A date which under the Oklahoma 3-year statute would have carried him back at the most to April 17, 1928.

to two of the respondents, Loew's and Vitagraph, verdicts in their favor were directed by the court and their cases were not considered by the jury (see, e.g., R. 1174) and (*b*) as to the remaining respondents, one of Judge Wyzanski's key rulings was, as stated in a dictum by the Court of Appeals, erroneously adverse (R. 2029; 172 F. 2d at 46-47). Public policy requires that this litigation, which has been in progress for eighteen years, be now at an end.

CONCLUSION

The decision below is correct, and there is no warrant for review of the questions presented by the petition. The petition should therefore be denied.

Respectfully submitted

JACOB J. KAPLAN

For Respondents

NUTTER, McCLENNEN & FISH

of Counsel

April, 1949.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 647

A. B. MOMAND,

Petitioner,

vs.

THE UNIVERSAL FILM EXCHANGES, INC., ET AL.

PETITION FOR REHEARING

JOHN W. CRAGUN,
JOHN F. CLAGETT,
HAROLD L. SCHILZ,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 647

A. B. MOMAND,

Petitioner,

vs.

THE UNIVERSAL FILM EXCHANGES, INC., ET AL.

PETITION FOR REHEARING

A. B. Momand, petitioner in the above-captioned cause, respectfully petitions the Court to rehear its order of May 2, 1949, denying his petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below

Opinions of the District Court appear at pp. 70, 91, 108, 140, 187, and following of the record. The one at p. 187 of the record was adopted by the Court of Appeals and is the opinion primarily involved in this case at this time. That opinion is reported in 72 F. Supp. 469, except that the report does not contain the schedules and appended analyses of the District Court showing the several issues which actually went to trial. The opinion of the United States Circuit Court of Appeals for the First Circuit appears in the record at p. 2016, and is reported in 172 F. 2d 37.

Grounds Upon Which a Rehearing is Sought

The court below made three major rulings with respect to petitioner's case. Two of these do not go to the entire case; they merely limit the extent of the recovery if petitioner were otherwise entitled to recover. Only the first of the grounds goes to petitioner's entire case; that first ground, as to matters with which the petition did not deal, furnishes the matters which undersigned counsel regard as presenting a serious conflict between the circuits on the basis of which this Court should grant the petition for rehearing and the writ of certiorari. A specification of errors intended to be urged, omitted from the petition for writ of certiorari, is set forth in the appendix.

This ground of the decision below which goes to the entire case is the question of the failure of petitioner's proof as a matter of law for the reason that—albeit true that the respondents violated the antitrust laws and that under §5 of the Clayton Act plaintiff is entitled to regard decrees in cases brought by the United States as *res judicata*—still respondents are not shown to have had any "specific intent" to injure plaintiff, and it follows that petitioner has suffered no injury at their hands.

Plaintiff, the petitioner, operated moving-picture houses in Oklahoma until the business failed—as petitioner claims (and as the jury here found under appropriate instructions) by reason of the unlawful combination and conspiracy of respondents. Not alone has that combination and conspiracy of respondents been specifically found with regard to the compulsory arbitration of disputes between motion-picture exhibitors (like petitioner) and respondents (*Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30) and with regard to credit committees (*United States* v. *First National Pictures, Inc.,* 282 U. S. 44). But § 5 of the Clayton Act provides that a final judgment or

decree in a prosecution or proceeding brought by the United States under the antitrust laws "shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." The section also provides for tolling the statute of limitations during the pendency of a proceeding or prosecution by the United States.[1] And in this case petitioner has brought himself squarely within the ultimate determinations of the cases prosecuted by the United States; in the case of each of the corporations in whose right this action is brought, petitioner (the exhibitor) was subjected to the very devices of the conspirators regarding arbitration and credit which have been held to violate the law. Under § 5, therefore, it seems apparent that petitioner is entitled to recover the damages suffered through the combination with no more than proof of the extent of those damages within the rules laid down by this Court starting with *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562, and culminating, so far as motion-picture cases like the present are concerned, with *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 263-265.

The courts below have, however, found a novel excuse from damages for combines and conspiracies like respondents who have defied the antitrust laws. Notwithstanding four volumes of record devoted to the specific question of damages from these two unlawful practices, and notwithstanding careful instruction of the jury, that "of course you are not to take into account losses which are attributable to other things" (R. 1181, and see 1176-7); and notwithstand-

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[1] Section 5 is set forth in full text in the appendix. It appears in Act of October 15, 1914, c. 323, 38 Stat. 730, 731, § 5; 15 U.S.C. § 16.

ing the verdict of the jury (R. 1194-1195, 1198-1199), the court below has stated:

> "If plaintiff, without showing any *specific intent of defendants to injure him* or any specific damaging transaction, proceeded voluntarily to make business arrangements which caused damages running to one-third of a million dollars, that conduct was too extravagant to be charged to defendants. The point is ably and fully discussed in the District Court's opinion, 72 F. Sup. 469, 476, 477. We approve what is said there, and see no need to review the question further." (R. 2020, italics supplied.)

The decision of the District Court to which reference is thus made is a careful and learned inquiry into the rule of mitigation of damages required of a plaintiff, who must do what he can to avert future harm and may not continue to permit himself to suffer damages to be billed to the defendant. Judge Wyzanski has, in the material cited (R. 197-199), brought to bear under the antitrust law, rulings and principles derived from the ancient law of damages in private torts which heretofore have been rejected by the courts. The natural effect of the imposition of such a doctrine in antitrust litigation is to allow damages only when the victim of the combination must go out of business on the occasion of the first unlawful assault made upon him.

But the rule applied elsewhere in an action where § 5 of the Clayton Act is available has been understood much more simply.[2] It is not whether there is a "specific intent" or whether the damages ought to be reduced by reason of plaintiff's failure to mitigate damages, but rather whether

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[2] It appears probable that Judge Wyzanski may be somewhat baffled by this Court's opinion in the *Bigelow* case, 327 U. S. 251. He ultimately disposes of its otherwise clear application to this aspect of this case by looking at a different problem of concern in that case, and so finding that the *Bigelow* case, as shown by its citations, "is the recurrent problem of certainty of causation in statutory and non-statutory torts." R. 209.

the plaintiff has been damaged. Thus it has been held, *Johnson* v. *Joseph Schlitz Brewing Co.* (E. D .Tenn. 1940), 33 F. Supp. 176, 180, aff'd. (C. C. A. 6th, 1940), 123 F. 2d 1016:

> "Once an illegal conspiracy in violation of the Sherman Act is shown, all the plaintiff need do is to show his damages. *Montague* v. *Lowry,* 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608; *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268, 55 S. Ct. 182, 79 L. Ed. 356; *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684."

And if petitioner entered into contracts with respondents who by concert and conspiracy gave him no alternative, how can the very wrong be pleaded by respondents as an excuse from damages? Even where an alternative to the injurious contracts is offered by the distributor-conspirators, it is held, where the alternative is itself unreasonable, that the alternative may not excuse the conspirators but instead augment the damages. *Ball* v. *Paramount Pictures* (C. C. A. 3d, 1948), 169 F. 2d 317, 321. Here, respondents have pointed to no alternative open to petitioner—reasonable or not.

This case is productive of conflict within the very ambit of the motion-picture cases. In *Theatre Inv. Co.* v. *R. K. O. Radio Pictures* (W.D. Wash. 1947), 72 F. Supp. 650, 657-7, the court found that if plaintiff did participate in the alleged monopoly and conspiracy to monopolize, it was due to the coercion by defendants and to the business necessity of reliance upon such film supply as they could obtain from the defendants upon defendants' terms in order that the plaintiffs might stay in business under the conditions confronting them, there being no adequate film supply other than defendants' available to them. In the present case

the District Court, in his learned opinion, pays no attention to the business necessity in which the repeated or continued damages or injuries were sustained, or to the rules prescribing pecuniary relief to one "injured in his business and property" according to the terms of the Sherman and Clayton Acts, or to the fact that those rules must be distinguished from the rules applicable in traditional or conventional actions for damages. See article by Professor Lawrence Vold, *A. Threefold Damages under the Antitrust Act Penal or Compensatory?* 28 Ky. L. J. 117, 137-159.

In the ordinary case the courts find merely that the final decree obtained by the United States in its proceeding itself establishes the *prima facie* case with only the requirement of proving that the plaintiff is one damaged by the unlawful combination or conspiracy. Thus, the Second Circuit has observed "that the decree of 1916 ran against all these defendants and under the Clayton Act (15 U. S. C. A. § 16) was itself *prima facie* evidence of their violation of the law. The evidence introduced, far from overcoming the *prima facie* effect of the decree, strongly tended to support the plaintiffs' allegations." *William H. Rankin Co.* v. *Associated Bill Posters of U. S.* (C. C. A. 2d, 1930), 42 F. 2d 152, 154, cert. den. 282 U. S. 864.

The ordinary course of a case such as this has been so well understood that the asserted discovery of a new[3] escape hatch such as that found below must be viewed with

[3] It is of passing interest to note that the words "specific intent" do not appear for the first time in antitrust decisions in the opinion below. The writer of the opinion below, as a member of the United States Court of Appeals for the Third Circuit, participated in the decision of *Ball* v. *Paramount Pictures* (C.C.A. 3d, 1948), 149 F. 2d 317, where, in referring to this Court's decision in *United States* v. *Paramount* (334 U. S. 131), the court stated "that case also reiterates that specific intent is not necessary in such a situation as is before us." The writer of the opinion below dissented in that case from the opinion of the majority holding the distributors liable. Sitting in the First Circuit by designation, the same phrase creeps into the opinion as the deter-

suspicion; for this Court, in repeated cases starting with *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, has ruled that the plaintiff, once the unlawful combination is established (as here it is established under § 5 of the Clayton Act), need show certainly that he was damaged (as here the jury, under appropriate instructions, has found that he was damaged), and that uncertainty as to the precise amount of damages (here given the novel term "lack of specific intent" or "any specific damaging transaction") may not be urged to preclude him from getting any of the damages that he has certainly suffered.

Bigelow v. *R. K. O. Radio Pictures*, 327 U. S. 251, 263-265;

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359, 378-379;

Johnson v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176; aff'd. (C. C. A. 6th, 1940), 123 F. 2d 1016;

Ellis v. *Inman, Poulsen & Co.* (C. C. A. 9th, 1904), 131 Fed. 182, 186;

Package Closure Corp. v. *Sealright Co.* (C. C. A. 2d, 1944), 141 F. 2d 972, 978;

American Can Co. v. *Ladoga Can Co.* (C. C. A. 7th, 1930), 44 F. 2d 763, cert. den. 282 U. S. 899;

Daniel, Enforcement of the Sherman Act by Actions for Treble Damages (1948), 34 Va. L. Rev. 901, 903-907.

Not alone is there conflict between the circuits. Many cases arising out of the Government decree (*United States* v. *Paramount Pictures*, 334 U. S. 131) are pending, and will doubtless be affected by the ruling of the First Circuit Court of Appeals herein. In each, the question of

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minative feature on which a result must be reached for the conspirators, rather than for the moving-picture exhibitor as was done in the *Ball* case. The phrase "specific intent" may or may not be used with different content and application in the *Ball* case as compared with its use in the present case.

the application of § 5 of the Clayton Act is involved, so that the new possibility of defeating the policy of the antitrust laws through requiring a showing of "specific intent" undoubtedly will be urged by these same conspirators in the other cases to make certain that they shall not suffer the consequences of their unlawful acts insofar as exhibitors have been driven to the wall merely by the general operation of the conspiracy, as opposed to some specific purpose to injure the particular exhibitor. Such cases are *Fifth and Walnut, Inc.* v. *Loew's Inc., et al.* (U.S.D.C., S.D., N.Y., now on appeal); *Windsor Theatre Co.* v. *Loew's Inc.* (No. 814-48, U.S.D.C., Dist. Col.); *H. B. Meiselman, et al.* v. *Paramount Pictures Distributing Corp.* (C.A. 669, U.S.D.C., W.D., N.C.); *Emerson W. Long, et al.* v. *Schine Theatrical Co., et al.* (C.A. No. 25795, U.S.D.C., N.D., Ohio); *Auburn* v. *Schine* (C.A. 48-736, U.S. D.C., S.D., N.Y.).

Conclusion

The petition for rehearing and the writ of certiorari should be granted.

Respectfully submitted,

JOHN W. CRAGUN,
JOHN F. CLAGETT,
HAROLD L. SCHILZ,
Counsel for Petitioner.

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; and that the petition is restricted to substantial grounds available to petitioner although not previously presented.

JOHN W. CRAGUN,
JOHN F. CLAGETT,
HAROLD L. SCHILZ

APPENDIX

Specification of Errors Intended to be Urged

The Court below erred:

1. In determining, with respect to the applicable statute of limitations, that:

(a) Both Massachusetts and Oklahoma statutes apply.

(b) The statute can commence to run prior to the time the conspiracy is discovered.

(c) The statute commenced to run prior to the cessation of the acts constituting the wrong.

(d) The statute is not tolled by § 5 of the Clayton Act unless the private action is on the entire cause complained in the government's proceedings.

(e) Holding that the only two government suits which might toll the statute were *Paramount Famous Lasky Corp.* v. *United States* (282 U. S. 30) and *United States* v. *First National Pictures, Inc.* (282 U. S. 44).

2. As to *res judicata* (estoppel by judgment):

(a) In holding that the findings as to conspiracy in the Oklahoma proceedings constitute an estoppel in the present action.

(b) In failing to hold that the legal claimant had so changed that the Oklahoma judgment might not be applied herein.

(c) In failing to hold that the mandate of the United States Circuit Court of Appeals for the Tenth Circuit directing the Oklahoma action to be dismissed without prejudice precluded holding the judgment in that case to be an estoppel.

(d) In holding that an estoppel might lie despite the different capacities in which the parties appeared in the two actions.

3. With respect to the issue of damages:

(a) In holding that it is necessary for petitioner to prove that respondents had any specific intent to injure petitioner.

(b) In holding that petitioner's failure to pay arbitration awards precluded the establishment of damages.

(c) In holding that petitioner had failed to prove the amount of his damages certainly.

(d) In holding that petitioner need, under § 5 of the Clayton Act, do more than establish damages suffered as a result of the combination and conspiracy.

(e) In holding that petitioner was precluded from recovering damages by reason of having entered into repeated contracts with the unlawful provisions.

(f) In failing to hold that business necessity compelled entering into the repeated contracts.

4. In reviewing the action of a jury, properly instructed, and with evidence before it to support its verdict.

5. In sustaining the action of the District Court.

Clayton Act, § 5

(Act of October 15, 1944, c. 323, Stat. 730, 731, 15 U.S.C. § 16.)

A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust

laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

(2607)

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 647

A. B. MOMAND
Petitioner

v.

UNIVERSAL FILM EXCHANGES, INC., LOEW'S INC., METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, VITAGRAPH, INC., RKO DISTRIBUTING CORPORATION, UNITED ARTISTS CORPORATION, COLUMBIA PICTURES CORPORATION
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR REHEARING

The petition for rehearing filed herein raises in rephrased form one of the questions which was raised by the original petition, (see pars. 9 and 10 of the "Questions Presented" in the petition (page 15) and pars. 8 and 9 in the "Reasons relied on for the allowance of the writ"

(page 18)), and argued in the supporting brief (pages 35-8). This would in and of itself be sufficient reason for denying the petition under the provisions of Rule 33 of this Court. The rephrased question, moreover, challenging as it does a phrase taken out of the context of the opinion below, surely falls far short of the "substantial grounds" required by the Rule.

Assuming, however, that the point represented by and reargued in the petition for rehearing is one which is now open for consideration, it is still clear that the petition should be denied.

The ground asserted as the basis for the petition for rehearing ignores wholly the effect of the estoppel by judgment and res judicata resulting from the judgments in favor of the respondents in the earlier actions brought by the plaintiff in Oklahoma (see Respondents' Brief in Opposition, pages 2 to 9), seizes upon a dictum in the opinion of the Court of Appeals, wrests it from its context, and seeks to make it say something which the Court did not say. The Court of Appeals never held, as asserted in the petition for rehearing, that a plaintiff in an antitrust action must show a "specific intent to injure" in order to recover. All that the Court of Appeals said on this subject appears at page 2020 of the Record (71 F. 2d 41-2), namely, that the petitioner herein could not recover in his continued litigation in the Massachusetts Court a loss claimed to have been caused by a conspiracy to force poor pictures and late bookings upon his assignors because it had been found in the earlier Oklahoma suit that there had been no such conspiracy and, furthermore, that even if any of the petitioner's claims were "free of the estoppel, and none appeared to be" (R. 2020) the petitioner inferentially could not recover *extraordinary* damages resulting from voluntary adoption by his assignors of an extravagant and unreasonable

course of conduct to avoid threatened harm of a relatively minor character in the absence of a showing of a specific intent of the respondents to injure the plaintiff's assignors. This was a proper paraphrase of well-settled principles of tort law and of damages as set forth in sections 918 and 919 of the Restatement of Torts and as to which there is no conflict with the decisions either of this Court or of any Circuit Court of Appeals. So far as this Court has spoken, its statements support the proposition. See *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U. S. 485 at 489 and cases cited. The proposition is in no sense a holding that a specific intent to injure is necessary as a prerequisite to any recovery in an anti-trust action. The Court of Appeals indeed ruled to the contrary. It cited as guiding cases on the matter of damages the decisions of this Court in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251; *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359; and *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 (R. 2021) with particular emphasis on the portion of the opinion of this Court in the *Story* case at page 562 to the effect that if some damages are found to be attributable to the wrong the plaintiff is entitled to have them assessed by the jury even if they are uncertain in amount.

CONCLUSION

It is accordingly submitted that the Petition for Rehearing should be denied.

Respectfully submitted,

JACOB J. KAPLAN
for Respondents

NUTTER, McCLENNEN & FISH
of Counsel

June, 1949